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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

EDWARD P. STRANG, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Edward P. Strang, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming his conviction in the United States District Court for the Eastern District of Michigan, Southern Division, for conspiracy to defraud the United States and to violate 18 U.S.C. § 1001 and for substantive violations of 18 U.S.C. § 1001.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet officially reported, is printed in Appendix A to this petition (*infra* at 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1968. A timely petition for rehearing en banc was denied on February 5, 1969. By order of February 26, 1969, Mr. Justice Potter Stewart extended the time for filing this petition to and including March 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a suspect may be required to testify before the grand jury considering the crime and, if so, whether he may be so required when the prosecutor: (a) refuses his request that retained counsel be present with him during his testimony; (b) does not advise him that he may consult with counsel before testifying and may have counsel available outside the grand jury room while he testifies; and (c) although aware that the suspect is represented by counsel, does not inform that counsel that his client has been subpoenaed before the grand jury.

2. Whether, when the evidence is susceptible of a conclusion that there were two conspiracies, the trial court denies a fair trial by refusing to submit to the jury the question whether the proof established two separate conspiracies, with one of which the accused was not connected, rather than the single conspiracy alleged in the indictment.

3. Whether, in a case where guilt or innocence depends upon the meaning of administrative regulations, a trial court may refuse to interpret those regulations, and, instead, submit the legal interpretation to the jury as a question of fact.

STATEMENT OF THE CASE

The petitioner, Edward P. Strang, Jr., named in thirteen counts of a thirty-three count indictment, was convicted on all the counts in which he was named. Among his co-defendants were: (1) Franklin Mortgage Corporation; (2) Benjamin Levinson, president of Franklin; (3) Ross Howard, executive assistant to Levinson; and (4) Rem Realty Company. Petitioner was president of Wayne National Life Insurance Company.

One of the counts on which petitioner was convicted alleged that, together with his co-defendants and one Robert Cerwin, an assistant to Levinson, he conspired to defraud the Veterans Administration (hereinafter V.A.) of its right to have its loan guaranty program administered pursuant to the provisions of 38 U.S.C. § 1801 *et seq.*, and the rules and regulations promulgated thereunder, and to violate 18 U.S.C. § 1001.[1] The remaining twelve counts upon which petitioner was convicted all alleged substantive violations of 18 U.S.C. § 1001, by submission of false statements to the V.A. On May 17, 1967, petitioner was sentenced to imprisonment for a term of eighteen months.

Petitioner's Appearance Before the Grand Jury

On October 20, 1964, a deputy United States Marshal attempted to serve a subpoena requiring petitioner to testify before a federal grand jury two days later. Petitioner's secretary informed the marshal that Peti-

[1] Petitioner contended in both courts below that this count failed to state an offense, relying largely upon this Court's decision in *Russell v. United States*, 369 U.S. 749 (1962). We note that the point is involved in this case, and is one which this Court may wish to consider.

tioner was out of town, read the subpoena and later that day informed him of its contents. The subpoena did not indicate the nature of the investigation. (247a-51a)[2]

On the morning of October 22, an Assistant United States Attorney telephoned petitioner at his home, told him that the grand jury was awaiting his appearance, asked him why he was not present at the Federal Building, and requested him to come there immediately. Although aware that petitioner was represented by counsel, the prosecutor had not informed counsel of the imminent grand jury appearance, but instead dealt directly with petitioner. Shortly thereafter, petitioner arrived at the Federal Building, where he was served with a subpoena requiring him to testify before the grand jury. (255a-61a; 1912a).

Before testifying, petitioner asked the prosecutor whether he could have his attorney present with him in the grand jury room. The prosecutor told him that he could not, but failed to advise him that he could consult counsel before testifying and could have counsel available outside the grand jury room for consultation purposes. Petitioner was informed, however, that he did not "have to testify to anything which would incriminate him," and was allowed to make a telephone call.

The Evidence at Trial

For purposes of this petition, the evidence may be summarized as follows:

In 1962, the Veterans Administration operated a loan guaranty program pursuant to 38 U.S.C. § 1801

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[2] All parenthetical references herein are to the Joint Appendix, filed with this Court.

et seq. and various regulations promulgated thereunder. Under this program, a veteran who met certain credit standards could obtain a loan which the V.A. would guarantee. The manner in which the loan would be guaranteed depended upon the status of the lender. A "nonsupervised" lender (an institution not subject by law to state or federal regulation) could have its loan to the veteran guaranteed only on a "prior approval" basis—i.e., matters such as the veteran's credit would be investigated by the V.A. before the guaranty was issued. On the other hand, "supervised" lenders could have their loans automatically guaranteed by the V.A. For these purposes, the Wayne Co., run by petitioner, was a "supervised" lender capable of obtaining loan guaranties on the "automatic" basis, whereas the Franklin Co., run by Levinson, was a "nonsupervised" lender.

In 1961 and 1962, Rem Realty Company sold houses to veterans (851a). Many of the veterans were poor credit risks, unable to obtain a home loan unless that loan were guaranteed. Accordingly, to induce the V.A. to guarantee loans, Rem salesmen were instructed by their superiors to falsify the veterans' credit status.

Additionally, officials of Rem forged the signatures of numerous veterans on various documents to be submitted to the lender and to the V.A. (909a-12a). By mid-December 1962, some of these cases had been sent to various companies for processing in the hope of obtaining a V.A. guaranty, while others remained dormant in the Rem offices.

Franklin was a large mortgage company dealing almost exclusively in government-insured mortgages. As a "nonsupervised" lender, it was required to deal

with the V.A. on the "prior approval" basis. Its dealings, however, had been far from satisfactory to that agency, which had requested Franklin to weed out obviously bad credit risks before submitting loan applications.

Franklin had also entered into arrangements with various "supervised" lenders, whereby it would process loan applications and submit them to the lender for acceptance or rejection. If the loan were accepted, the "supervised" lender would submit it to the V.A. for automatic guaranty and would then assign the mortgage back to Franklin. Such arrangements were proving unsatisfactory to Franklin, for some lenders were rejecting loans on the ground that the borrowers were bad credit risks. By December 1962, Franklin desperately needed new "automatic" sources. Accordingly, Levinson told his assistant Ross Howard to seek such new sources, and Howard thereupon contacted petitioner at Wayne.

Wayne was a small life insurance company with about five employees, including petitioner, its president. In mid-December 1962, Howard introduced petitioner to Levinson, and a meeting took place at the Franklin offices, attended by Levinson, Howard, petitioner and one Robert Cerwin, Levinson's assistant, who was to become the Government's chief witness at the trial. Petitioner was unfamiliar with the V.A. loan guaranty program, so Cerwin explained it to him (720a-27a).

Petitioner was then presented with the proposal that Franklin would originate, process and do a credit check on approximately $200,000 in loans to be made by Wayne. Wayne would then submit the loans to

the V.A. for automatic guaranty. After the guaranty was issued, Franklin would take an assignment of the loans. Wayne's sole task would be to put up the money; it could rely on Franklin for everything else. Cerwin explained to petitioner the "accommodation arangements" which Franklin had entered into with other supervised lenders, and stressed the mutual benefits which would flow from such an arrangement between Franklin and Wayne. Petitioner agreed. Despite what he had been told, however, he had not entered into an accommodation arrangement precisely the same as those which Franklin had made with other supervised lenders, for in every other such arrangement, the supervised lender exercised its own judgment as to whether the proposed loan was a proper one, and did not merely rely on Franklin's judgment.

Having made this arrangement with petitioner, Levinson began to gather loans to submit to Wayne. Not having enough to meet his commitment of $200,000, he contacted Rem officials and asked them to bring to Franklin whatever loans they had, even those involving poor credit risks, for he had found, he stated, a supervised lender who would take anything (586a-88a). Franklin thus obtained twelve to fifteen loan cases, many of which involved credit information which had been falsified by Rem salesmen. Cerwin warned Levinson that the credit status of some of the veterans was so bad that he would be "looking for trouble" if he were to submit them to the V.A. Levinson gave orders to process them anyway, and Cerwin did so.

A number of the loan applications which Wayne submitted to the V.A., after receiving them from Frank-

lin, contained not only false statements but also forgeries of the signatures of the veterans and of the petitioner. Petitioner, however, was never informed of the false statements, never authorized anyone to sign his name to the various loan documents, and was not even informed that the veterans whose loans he was submitting to the V.A. for automatic guaranty were poor credit risks (736a-37a; 772a-73a). Pursuant to the agreement, he relied upon Franklin to evaluate the veterans' credit.

The V.A. Regulations and Petitioner's Defense

It was the Government's theory that petitioner, his co-defendants and certain others had entered into a single conspiracy: (1) to defraud the V.A., by means of the "accommodation arrangement," of its right to have its loan guaranty program administered according to the terms of the appropriate statute and the rules and regulations promulgated thereunder, and (2) to submit to the V.A. false statements in the loan applications and other required documents. Petitioner's defense was based upon the propositions that: (1) the "accommodation arrangement" he had entered into with Levinson was not only not forbidden by V.A. regulations, but was actually authorized by them; (2) he had no knowledge that the documents that had been submitted to the V.A. contained false statements.

Petitioner's defense with respect to the accommodation arrangement pointed to a V.A. general information letter dated June 19, 1963—issued after all the loan applications involved in this case had been submitted to the V.A. This letter described the type of arrangement into which Wayne and Franklin had en-

tered and had stated that it would *no longer* be permitted. That letter is reproduced as Appendix B (*infra* at 32a). According to a V.A. official who testified for the Government, this letter announced a definite change in V.A. policy and regulations (430a, 499a).

Petitioner contended, therefore, that the arrangement he concededly made with Levinson was, at the time that he made it, an innocent arrangement permitted by the regulations.

Petitioner's defense with respect to the false statements was that he was unaware of them. Indeed, the two chief Government witnesses had firmly supported that defense (772a-73a; 832a-35a). And the evidence showed that his co-defendants had forged his signature on most of the loan documents, thus making it unnecessary for him even to see them.

The Charge and the Jury's Deliberations

Viewing the meaning of the regulations upon which petitioner relied as a question of fact, the trial court refused, though requested, to interpret the regulations for the jury in its charge. The court also refused to give to the jury a requested charge that was essential to a proper consideration of the evidence. This requested charge, reprinted in full as Appendix C (*infra* at 33a), would have given to the jury the question whether the proof showed more than one conspiracy and, if so, would have required them to consider, as against a defendant involved in but one conspiracy, only that evidence bearing upon the conspiracy in which he was involved.

During the course of their deliberations, after they had rendered verdicts as to all defendants save Peti-

tioner and Howard, the jury made the following inquiry of the court (1793a):

> What is the procedure when we find a defendant guilty on one part of a count, but not guilty on one or two other parts (of same count)?

The prosecutor and all defense counsel understood this inquiry as referring to the conspiracy count (1793a-95a). In view of the proof against Howard, it is inconceivable that the inquiry referred to him, rather than to petitioner. Counsel for petitioner requested the court to charge that a finding of guilt as to all parts of the conspiracy count was a prerequisite to a guilty verdict on that count, specifically relying upon the principle of *Kotteakos* v. *United States,* 328 U.S. 750 (1946). The court refused the request, stating that *Kotteakos* did not having "anything to do with this lawsuit." (1921a-22a). In response to the jury's inquiry, the court merely referred to its original charge on the law of conspiracy.

On the third day of their deliberations, the jury found petitioner guilty as charged.

REASONS FOR GRANTING THE WRIT

1. This case squarely presents a number of issues dealing with the question as to how a suspect's rights under the Fifth and Sixth Amendments should be protected when he is subpoenaed to give testimony before a grand jury inquiring into the crime. Such a person is placed in a situation where his Fifth Amendment rights are in jeopardy. Under present law, the suspect has no right, as he has elsewhere, to remain silent. He must decide, at his peril, which questions are incriminating and which are not. If he answers an incrimi-

nating question, he may be held to have waived his privilege with respect to the subject matter covered by the question; if he refuses to answer a non-incriminating question, he may be guilty of contempt. And the determination of whether a question is incriminating is often a difficult one to make, for the possible application of the privilege against self-incrimination to any particular question depends upon criteria so vague "that lawyers, let alone laymen, will have difficulty in knowing when to claim it." *Rogers* v. *United States,* 340 U.S. 367, 378 (1951) (Black, J., dissenting). Each question put poses the problem anew. And the suspect must solve the legal problem, under present law, without counsel by his side. Moreover, the suspects's very demeanor, even if he does not claim his privilege, may turn the grand jurors against him in cases where they would not have voted an indictment had he not appeared before them.

In light of these grave dangers to a suspect's Fifth Amendment rights, a serious question arises as to whether a suspect should ever be forced to give testimony before the grand jury. At trial, the accused need not testify, and any comment on his failure to do so violates the Fifth Amendment. *Griffin* v. *California,* 380 U.S. 609 (1965). In the police station, the suspect need not respond to the questions of his accusers. Whether a different rule should prevail at the grand jury level, where Fifth Amendment rights are in grave jeopardy, is one of the issues raised by this petition.

It is by no means, however, the major issue, for even if it may be said that our system of criminal justice should continue to tolerate so great a peril to a suspect's Fifth Amendment rights, there are a number

of important questions involved here dealing with how those rights may be effectively safeguarded.

(a) A possible safeguard, and one specifically requested by petitioner prior to his grand jury testimony, is to permit the suspect to have counsel actually with him when he testifies before the grand jury. *Sheridan* v. *Garrison,* 273 F. Supp. 673 (E.D. La. 1967) stands for the proposition that the Constitution will permit nothing less.

The circumstances which entitle a person to the assistance of counsel have been spelled out by this Court in a long line of cases, one of the most recent being *United States* v. *Wade,* 388 U.S. 218 (1967). There, this Court stated that it had the duty "to scrutinize *any* pretrial confrontation of the accused" by law enforcement agents and to apply to it the principle of the decided cases, i.e., "to analyze whether potential substantial prejudice to defendants' rights inheres in the particular confrontation and the ability of counsel to help avoid the prejudice." 388 U.S. at 227. This thought runs throughout *Wade's* entire discussion of the meaning of the right to counsel. Thus, this Court stated that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. at 226. The Court made the test to be applied abundantly clear by contrasting its ruling in *Schmerber* v. *California,* 384 U.S. 757 (1966) with its ruling in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). In *Schmerber,* a Sixth Amendment claim by a motorist from whom a blood sample had been extracted in the absence of counsel was rejected on the ground that "[n]o issue of counsel's ability to assist the

petitioner in respect of any rights he did possess" was presented. 384 U.S. at 766, quoted in *Wade, supra,* at 223. In *Miranda,* however, the right to the presence of counsel during police interrogation was granted to suspects because of this Court's "finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation." 388 U.S. at 226.

Noting that *Sheridan* is the only case ever to hold that a suspect has the right to have counsel present in the grand jury room, the Sixth Circuit declined to apply to grand jury proceedings the principles spelled out in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), *Miranda* and *Wade.* In doing so, the court perpetuated an anomaly in the law concerning the right to counsel. Under the Sixth Amendment as it is now understood, the only place where a suspect may be required to "stand alone against the State" is inside a grand jury room, where his Fifth Amendment rights are at least as greatly imperiled as they are in places where no door may lawfully be shut in counsel's face. Whether that is a proper understanding of the Sixth Amendment, and a proper result in an adversary system, is one of the basic questions presented by this petition.

(b) A second possible safeguard, which is not only based upon fundamental fairness to the suspect but also in no way interferes with the function of the grand jury, is to require the prosecutor to inform the suspect that he may consult counsel before testifying and have counsel available outside the grand jury room, for purposes of consultation, while testifying. That petitioner had such a right should never have been doubted, and many federal prosecutors advise potential defendants of that right. See, e.g.: *Kitchell* v. *United States,* 354

F. 2d 715, 720 n. 9 (1st Cir.), *cert. denied,* 384 U.S. 1011 (1966); *United States* v. *Tramunti,* 343 F. 2d 548 (2d Cir. 1965), *vacated on other grounds,* 384 U.S. 886 (1966); *United States* v. *Leighton,* 265 F. Supp. 27 (S.D.N.Y. 1967). If, in order to protect a suspect's Fifth Amendment rights, the police may be required to advise him of his right to have counsel available during interrogation, why should a prosecutor, from whom one tends to expect more, be allowed to withhold similar advice from one obviously interested in knowing what his right to counsel means?[3] See *United States* v. *Fructman,* 282 F. Supp. 534, 536 (N.D. Ohio 1968).

(c) A final Sixth Amendment question is raised by the fact that the prosecutor, with full knowledge that petitioner was represented by counsel, dealt directly with petitioner, rather than through counsel. Canon 9 of the American Bar Association Canons of Professional Ethics reads, in part, as follows:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

It is clear that Canon 9 is applicable to prosecutors investigating a criminal case. See American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 640 (1957) (Decision No.

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[3] The revisers of New York's law on criminal procedure have deemed it so important that a suspect about to be questioned under waiver of immunity before the grand jury be informed of his right to consult counsel, that a failure so to advise him will result in an automatic grant of complete immunity. See Proposed New York Criminal Procedure Law § 95.50(3). (Edw. Thompson Co. 1967).

249). It is equally clear that, in bypassing counsel and in dealing directly with petitioner, the prosecutor violated the Canon. We submit that such a violation of Canon 9 in a criminal case amounts to a concomitant violation of a suspect's Sixth Amendment right to the assistance of counsel. Although this Court has previously so intimated in *Escobedo* v. *Illinois, supra* at 487 n. 7, it has not yet taken the opportunity so to hold. This case presents that opportunity.

In holding that there was "no obligation on the part of the government counsel to notify Strang's counsel that Strang was subpoenaed before the grand jury," the Sixth Circuit appears to have parted company with the District of Columbia Circuit. In *Jones* v. *United States,* 342 F. 2d 863, 871, 874 (D.C. Cir. 1964), four of the eleven sitting judges stated that:

> By failing to inform counsel of the impending examination [before the grand jury], the prosecution deprived [defendant] . . . of his assistance, at a crucial time and greatly to . . . [defendant's] prejudice; his right to counsel was violated by failure to notify his lawyer that he was to appear.

Two other judges, making a majority of the Court, agreed that the grand jury procedure there followed was improper, disagreeing only as to the sanction that should be imposed. Since there is no unified opinion in *Jones,* it is not suggested that there is a direct decisional conflict between the Sixth and the District of Columbia Circuits. However, the conflict in views between those circuits contributes to the worthiness of the point being raised here for review.[4] Even if the

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[4] See *People* v. *Arthur,* 22 N.Y. 2d 325 (1968), where the New York Court of Appeals held that once counsel is in a case, all questioning of a suspect must cease, unless the suspect waives his right to counsel *in the presence of counsel.*

prosecutor should not be required to inform a suspect of his rights, he surely should be required to observe the Canons of Professional Ethics and to notify the suspect's counsel of any proposed interrogation.

2. It was petitioner's position throughout the trial that, although the transaction alleged in the first count was a single, unified conspiracy insofar as his co-defendants were concerned, it consisted, as to him, of two separate and distinct plans, with one of which (the plan to submit false statements) he was in no way involved, and the other of which (the accommodation arrangement) was perfectly lawful, or at least considered lawful by him when he entered into it. There was ample evidence to support these contentions, e.g., the testimony of the two chief Government witnesses that petitioner did not know of the false statements being made to the V.A. by his co-defendants.

The trial court made it virtually impossible for the jury to give fair consideration to this defense. By failing to charge as petitioner requested on the question of variance, it allowed petitioner to be gravely prejudiced by evidence which may not have had any bearing upon his individual guilt or innocence. In *Kotteakos* v. *United States*, 328 U.S. 750, 769-70 (1946), this Court reversed a conviction for an alleged single conspiracy where the proof showed a number of separate conspiracies, stating that the major vice of the variance:

> was to prevent the [trial] court from giving a precautionary instruction such as would be appropriate, perhaps required, in cases where related but separate conspiracies are tried together . . ., namely that the jury should take care to consider the evidence relating to each conspiracy separately

from that relating to each other conspiracy charged.

The question here presented to the Court is not the all-too-familiar one that the proof in the case showed a variance as a matter of law, although such an argument could reasonably be made; it is, rather, that the issue whether a variance existed was not submitted to the jury. That issue involves a fact question for the jury's determination. See, e.g.: *United States* v. *Crosby,* 294 F. 2d 928, 945 (2d Cir. 1961), *cert. denied sub nom. Mittelman* v. *United States,* 368 U.S. 984 (1962) ("Whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement."); *Lefco* v. *United States,* 74 F. 2d 66, 69 (3d Cir. 1934); *United States* v. *McConnell,* 285 Fed. 164, 166 (E.D. Pa. 1923). The jury's determination of that question of fact is crucial in a case such as this, for upon it is likely to hinge the verdict.

If a jury, in a case possibly involving multiple conspiracies rather than the single one charged, finds as a fact that more than one conspiracy was proved, then it may not consider as against a defendant involved in only one of the conspiracies evidence which relates solely to the other separate conspiracies. Illustrative of this important principle is *United States* v. *Lev,* 258 F. 2d 9 (2d Cir. 1958), *aff'd on other grounds,* 360 U.S. 470 (1959). There, four defendants had been convicted under a conspiracy count alleging fraud in the procurement of Government contracts. The contracts involved the sale of Army garrison hats (the "Bonita transaction") and Navy hats (the "white hat transaction"). The trial court had charged the jury that there was not one conspiracy, but two. All defendants

alleged a fatal variance. The Second Circuit stated, at page 11, that:

> Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is properly speaking, no variance. [Citing cases].
>
> As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him.

The Second Circuit went on to find that the error as to Lev was harmless, because the trial court's instructions scrupulously protected his right to have only the evidence bearing on the transaction in which he participated considered by the jury in determining his guilt or innocence. See also: *United States* v. *Borelli,* 336 F. 2d 376, 386 n. 4 (2d Cir. 1964), *cert. denied* 379 U.S. 960 (1965); *Fernandez* v. *United States,* 329 F. 2d 899 (9th Cir.), *cert. denied,* 379 U.S. 832 (1964); *Hayes* v. *United States,* 329 F. 2d 209, 214 (8th Cir.), *cert. denied,* 377 U.S. 980 (1964); *United States* v. *Manton,* 107 F. 2d 834, 840 (2d Cir. 1938), *cert. denied,* 309 U.S. 664 (1940).

No such instructions were given in this case, and thus petitioner, whose defense was that the accommodation arrangement—the only agreement of which he had any knowledge—was lawful or at least thought by him to be lawful, was prejudiced by the jury's use against him of the numerous acts of wrongdoing committed by his co-defendants. Those acts included falsi-

fications and forgeries on V.A. loan documents, deceptions practiced upon uneducated veterans (851a-52a), false threats to put a veteran in jail if he failed to move into a house which he had purchased (1068a) and Levinson's conduct in defrauding the F.H.A. with respect to two veterans' loans which had been turned down by the V.A. To have such conduct attributed to him and used against him, even though he never agreed to it or even knew about it, fatally prejudiced his case. See, e.g., *United States* v. *Kelly,* 349 F. 2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966).

In dealing with the issue raised here, the Sixth Circuit stated that there was "more than sufficient evidence to support the jury's implicit finding of a single conspiracy." That statement, however, is a legal impossibility. Only if given some instruction such as petitioner had requested could the jury, implicitly or explicitly, have found there was a single conspiracy. In fact, the jury was never given the opportunity to choose between a single and multiple conspiracy. Moreover, the alleged "implicit finding" is contradicted by the record; the jury inquiry demonstrates that the jurors were actually attempting to make a finding of two separate plans, with one of which petitioner had nothing to do. The trial court nevertheless refused to allow the jury to make such a finding.

The issue presented here far transcends the guilt or innocence of this particular petitioner. The conspiracy device is a prosecutorial favorite in the federal system; countless prosecutions for conspiracy are instituted in federal courts each year. The variance issue is perhaps the most recurrent in these cases. Taking that issue away from the jury, thus laying the

accused open to the risk that there will be attributed to him evidence concerning a conspiracy in which he did not participate, so erroneously weights the balance against the accused as to make a defense, hitherto most difficult, henceforth virtually impossible. In approving such a course, the Sixth Circuit is in sharp conflict with numerous other circuits which have been called upon to decide the issue. See, e.g.: *United States* v. *Lev, supra* (2d Cir.); *United States* v. *Crosby, supra* (2d Cir.); *Lefco* v. *United States, supra* (3rd Cir.); *United States* v. *Goss,* 329 F. 2d 180 (4th Cir.); *Papalia* v. *United States,* 243 F. 2d 437 (5th Cir. 1957); *Hayes* v. *United States, supra* (8th Cir.); *Fernandez* v. *United States, supra* (9th Cir.).

3. Many federal prosecutions involve the precise meaning of governmental administrative regulations. In this case, petitioner's guilt or innocence hinged upon the precise meaning of certain V.A. regulations. The conspiracy count alleged, in part, a conspiracy to defraud the V.A. of its right to have its loan guaranty program administered in accordance with its rules and regulations. Here the case was submitted to the jury upon the Government's theory that petitioner intentionally agreed to violate V.A. regulations by delegating to Franklin the non-delegable duty of checking the credit of applicants for guaranteed loans.[5] Petitioner's theory was that those regulations specifically authorized the delegation of duty which was part of the "accommodation arrangement." The meaning

[5] This was not the theory, however, which was pleaded in the indictment or upon which the Government presented most of its case, a point which petitioner raised below in arguing that the indictment failed to state an offense. See footnote 1, *supra.*

of the regulations upon which petitioner relied was thus the crux of the case.[6]

During the pre-charge conference, the trial court noted that all the applicable regulations were contained in a document (The Lenders Handbook) which had been received in evidence and which could therefore be examined by the jury. The court further noted that there was "a difference of opinion as to what the impact of the regulations is," and stated that he therefore regarded the matter as a "question of fact." Counsel for petitioner specifically requested the court to interpret the regulations and "to advise the jury of what his construction of the law is," but the court refused to do so (1653a-54a), and gave the jury no instructions whatsoever as to the meaning of the regulations involved. The Sixth Circuit approved that course, contenting itself with observing that the regulations were before the jury, had been referred to extensively by defense counsel throughout the trial, and had been explained and interpreted from the witness stand by an official of the V.A. Having first, to petitioner's prejudice, treated a question of fact (whether there was a variance) as a question of law, the Sixth Circuit, again to petitioner's prejudice, now treated a question of law (the meaning of the regulations) as a question of fact.

In ruling as it did, the Sixth Circuit is in direct conflict with the Second Circuit. *United States* v. *Gu-*

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[6] Since absolutely no evidence was presented showing that petitioner knew of the submission of false statements to the V.A., his conviction on the substantive counts necessarily rests upon the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), which was charged to the jury. Thus, guilt on all counts depended upon a finding that, when agreeing to the accommodation arrangement, petitioner knew he was violating V. A. regulations.

terma, 281 F. 2d 742, 751-52 (2d Cir. 1960) (conviction reversed because "the judge gave the jury a task properly his own, namely, the interpretation of the term 'net book value' in SEC Instruction 4 as applied to a pledge of securities"). The importance of this issue is underscored by the constant and boundless proliferation of federal administrative regulations, any one of which may and often does become a crucial issue in a criminal prosecution. This Court should not view lightly the prospect that juries of laymen may have thrust upon them the function of construing these regulations, often so labyrinthine as to confound trained legal minds, and may be permitted, by their unreviewable conflicting constructions, to make the law apply differently from one case to another.

CONCLUSION

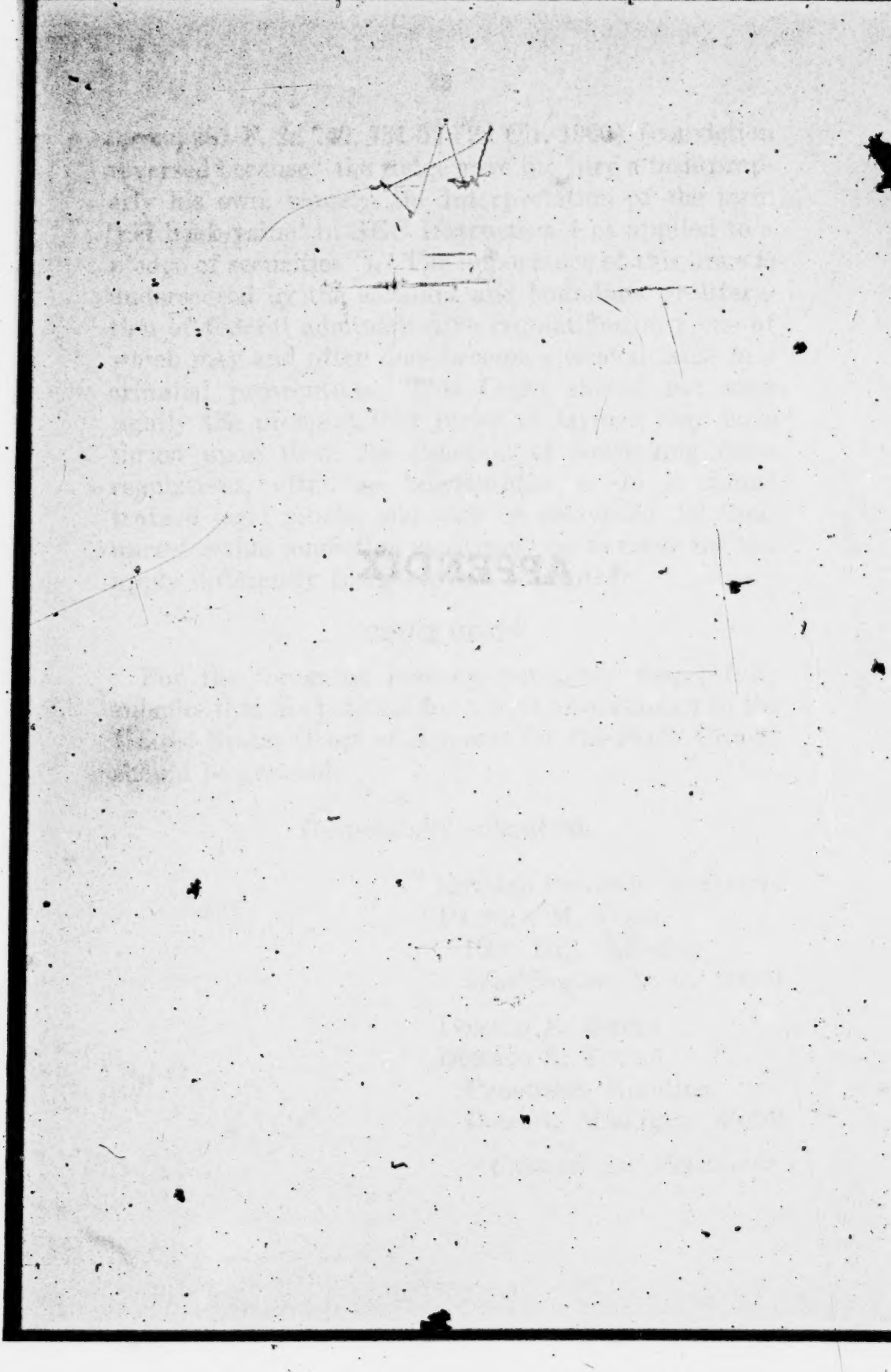
For the foregoing reasons, petitioner respectfully submits that his petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18204, 18205, 18206, 18207

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

BENJAMIN LEVINSON, FRANKLIN MORTGAGE CORPORATION, EDWARD P. STRANG, JR., ROSS HOWARD,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

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Decided December 30, 1968

Before: PHILLIPS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. Edward P. Strang, Jr., Ross Howard, Franklin Mortgage Corporation and Benjamin Levinson, defendants-appellants herein, appeal from judgment of conviction in the United States District Court for the Eastern District of Michigan. The essence of the offense of which the appellants were convicted, as charged in the first count of the indictment, was a conspiracy to defraud the United States through the Veterans Administration, an agency of the United States, by preventing the

Veterans Administration from having its loan guaranty program administered in accordance with the provisions of Section 1801 et seq., Title 18, U.S.C. and the rules and regulations promulgated thereunder. Although the indictment contained 33 counts, the trial judge severed counts 26 through 33 from the instant trial. The substantive offenses charged in counts 2 through 25 of the indictment stem from the alleged conspiracy in the first count.

In addition to the appellants herein, Richard David Mitchell, Richard E. Medinis, Thomas Whitford and Rem Realty Company, a Michigan corporation, were also indicted in the first count of the indictment. Robert Cerwin, an employee of Franklin Mortgage Corporation, was named as a co-conspirator but was not indicted. Rem Realty Company became defunct as a corporation and was dismissed before trial. Richard E. Medinis pleaded guilty and Thomas Whitford was dismissed at the close of the government's case. Richard David Mitchell was convicted but is now deceased.

Counts 2 to 5, 8 to 10 and 12 to 15 charged Levinson, Franklin, Strang, Mitchell, Medinis, Rem Realty and Howard with specific violations of Section 1001,[1] Title 18, U.S.C. Counts 6, 7, 16 and 17 charged Levinson, Franklin and Howard with specific violations of Section 1001. Count 11 charged Levinson, Franklin and Strang with a violation of Section 1001. Counts 18 and 19 charged Medinis, Mitchell, Rem Realty and Whitford with specific violations of Section 1001. Counts 20 to 25 charged Mitchell, Medinis and

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[1] Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Rem Realty with violations of Section 1001. The severed counts of the indictment, Nos. 26 through 33, involve similar conspiracy and substantive offenses relative to the loan program of the Federal Housing Administration (FHA).

The case was tried before a jury and all of the defendants, except Whitford, Rem Realty and Medinis, were convicted on all of the counts of the indictment. The trial judge sentenced Franklin to pay a $10,000 fine, and sentenced Levinson, Strang and Howard each to pay a $10,000 fine and to 18 months' imprisonment upon their pleas "of not guilty and verdict(s) of guilty of the offense of conspiracy; false statements to obtain VA loans; aiding and abetting; in violation of Sections 371, 1001 and 2, Title 18, U.S.C., as charged in the indictment; . . ."

The Veterans Administration's home loan program is based upon Section 1801 et seq., Title 38, U.S.C., and the regulations promulgated thereunder. The statutory plans provide for the issuance by the VA of guaranties on mortgage loans made to veterans. To participate in this program a veteran must have been discharged under other than dishonorable conditions and have served a minimum of 90 days' service. Section 1810(b) states that no loan may be guaranteed unless

> "(1) the proceeds of such loan will be used to pay for the property purchased, constructed, or improved;
>
> "(2) the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses;
>
> "(3) the veteran is a satisfactory credit risk;
>
> "(4) the nature and condition of the property is such as to be suitable for dwelling purposes;
>
> "(5) the price paid or to be paid by the veteran for such property, or for the cost of construction, repairs,

or alterations, does not exceed the reasonable value thereof as determined by the Administrator; and

"(6) if the loan is for repair, alteration or improvement of property, such repair, alteration, or improvement substantially protects or improves the basic livability or utility of such property."

Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Section 1802(d) provides for the issuance of automatic guaranties on loans made by "supervised lenders." A "supervised lender" is generally any financial institution, insurance or mortgage and loan company that is subject to "examination and supervision" of an agency of the federal or a state government. Wayne National Life Insurance Company qualified as a "supervised lender" because it was an insurance company subject to the supervision of the Michigan Insurance Commissioner. It is the responsibility of the supervised lender to determine whether the loan meets the requirements of the statute and regulations. Section 1032, Veterans Administration Regulations.

Unlike supervised lenders, whose loans are automatically guaranteed by the VA, "non-supervised lenders" must seek guaranties on the "prior approval basis." A "non-supervised lender" is one that is not subject to the supervision of a federal or state agency. Franklin Mortgage Corporation was a non-supervised lender. Under the "prior approval basis" of obtaining guaranties, the VA, not the lender, makes the final determination as to whether or not the loan comports with all statutory and regulatory requirements. The VA would make this determination on the basis of the pertinent information required to be submitted to it by the lender. If the loan is held to qualify, the VA so notifies the lender who then closes the loan and submits the loan to the VA who issues its guaranty.

The benefits of obtaining guaranties on the automatic basis are twofold. It relieves the VA of the necessity of

making a detailed and lengthy study of the loan application to see if it qualifies for a guaranty. This responsibility is assumed by the supervised lender who certifies that "the loan conforms otherwise with the applicable provisions of 38 U.S.C., Chapter 37, and of the regulations concerning guaranty of insurance of loans to veterans." Because the VA does not make the determination of eligibility, the guaranties are issued much sooner than if the application had been submitted on a prior approval basis.

Appellants Strang and Howard contend that the conspiracy count of the indictment, Count one, is defective and insufficient and should have been quashed. Both of these appellants made pre-trial motions to this effect which were denied by the trial judge. The decisions of the Supreme Court make it clear that a valid indictment must fulfill two distinct functions. First, an indictment must inform the accused of the nature of the charges against him, with such specificity and particularity that the accused is enabled to undertake and prepare an adequate defense. Second, an indictment must be so framed that it should be evident to what extent a plea of double jeopardy is available to the accused in the event of future charges involving similar offenses. *United States* v. *Debrow*, 346 U.S. 374; *Hagner* v. *United States*, 285 U.S. 427; *Russell* v. *United States*, 369 U.S. 749.

Although an indictment is subject to careful examination to assure conformity with the strict requirements mentioned above, not all lapses from precision and correctness require that an indictment be quashed. Non-prejudicial errors and defects do not invalidate indictments which otherwise fulfill the two prime requisites of informing the accused of the nature of the charge and defining the scope of a future plea of double jeopardy. *Smith* v. *United States*, 360 U.S. 1; *Williams* v. *United States*, 341 U.S. 97. The essence of this principle is found in Rule 52(a) of the Federal Rules of Criminal Procedure which states that "Any error, defect,

irregularity or variance which does not affect substantial rights shall be disregarded."

Rule 7(c) of the F.R.Crim.P. provides that "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In addition to stating the specific statutory violation alleged, the indictment must indicate the manner in which the alleged violation occurred and the essential factual allegations in support thereof. An indictment which does not mislead the accused as to the nature of the offense charged, enables him to prepare an adequate defense and is specific enough to prevent future prosecutions for the same offense, is valid in spite of any minor deficiencies or technical errors.

Count one of the indictment charged the defendants with a violation of Section 371, Title 18, U.S.C., the general conspiracy section. Section 371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

This section provides criminal sanctions for two distinct types of conspiratorial action. The first, involving a conspiracy to "commit any offense" against the United States, concerns conspiracies having as their object the commission of unlawful acts subject to criminal prosecution or suit for penalty. *United States* v. *Hutto,* 256 U.S. 524. The second prong of the general conspiracy section, involving a conspiracy "to defraud the United States," includes conspiracies having as their purpose impairing, obstructing or defeating the lawful function of any department of government. *Haas* v. *Henkel,* 216 U.S. 462.

Count one of the present indictment charges that the defendants

> ". . . did in violation of Title 18, U.S.C., Section 371, unlawfully, wilfully, knowingly and feloniously conspire between and among themselves, and with others to the Grand Jury unknown, to commit offenses against the United States of America, to-wit: to defraud the United States of America, in particular the Veterans Administration, an agency of the United States of America, of its right to have it loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38 United States Code, and the rules and regulations promulgated thereunder, and to violate Section 1001, Title 18, United States Code."

This indictment is admittedly artlessly framed by charging defendants with a conspiracy to commit the offense of defrauding the United States by failing to adhere to the provisions of Section 1801 et seq. Section 1801 et seq. does not create a substantive criminal offense or provide a penalty for failure to follow its prescriptions. Thus if the indictment is read literally under the "offense" portion of Section 371 a conspiracy to commit an "offense" is not properly alleged. But such a literal reading of the indictment does damage to the plain and obvious meaning it was intended to impart. It is obvious that what was meant to be charged was a conspiracy to defraud the United States. The words "to commit offenses against the United States of America, to-wit:" are, in regard to this portion of the indictment, mere surplusage and can be ignored. *United States* v. *Vazquez,* 319 F.2d 381 (C.A. 3), cert. den. 385 U.S. 846. "The insertion of surplus words in the indictment does not change the nature of the offense charged." *Bridges* v. *United States,* 346 U.S. 209, 223. See also, *Bary* v. *United States,* 292 F.2d 53 (C.A. 10); *United States* v. *Chunn,* 347 F.2d 717 (C.A. 4). These words, which are surplusage with respect to the "defraud" portion of the

indictment, more properly belong with the part of the indictment which charges defendants with conspiring to "violate Section 1001, Title 18, United States Code." Count one of the indictment makes it evident and clear that the defendants are charged with a conspiracy to defraud the United States and to commit offenses against the United States in violation of Section 1001, Title 18, U.S.C. There can be no misunderstanding of the nature of the charges and consequently no resulting prejudice to the defendants.

Appellants further argue that the portion of Count one charging a conspiracy to violate Section 1001, Title 18, U.S.C. is insufficient because it merely cites the substantive crime which was the object of the alleged conspiracy. If all that Count one of the indictment contained was a simple allegation that defendants conspired to violate a particular provision of the criminal code, appellants' position would be correct. However, paragraph four of Count one states that

> "It was a further part of said conspiracy that the defendants would submit and cause to be submitted, the following loan documents and reports, among others, to the Veterans Administration . . . which loan documents contained false and fraudulent statements. . . ."

This paragraph defines that portion of the conspiracy dealing with the violation of Section 1001.

Appellants challenge the sufficiency of paragraph four arguing that it merely alleges what was done instead of what was agreed to be done. However, paragraph four specifically alleges that as part of the conspiracy the defendants "would submit, and cause to be submitted," false and fraudulent documents.

The statement in the indictment that the defendants conspired to defraud the United States "of its right to have its loan guaranty program administered in accordance with

the provisions of Section 1801, et seq., Title 38, United States Code, and the rules and regulations promulgated thereunder" is a clear and definite statement of the governmental function which the defendants allegedly conspired to obstruct and impair. We hold that the indictment is not vague or ambiguous and thus satisfied the requirements of the Sixth Amendment.

The following statement by the Supreme Court in *United States* v. *Debrow, supra*, at 377-378, is relevant to the alleged insufficiency and invalidity of the present indictment:

> "The charges of the indictment followed substantially the wording of the statute which embodies all the elements of the crime, and such charges clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain. If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7(f), F.R. Crim.Proc."

We hold that the indictment is sufficient and does not violate the Fifth or Sixth Amendments to the Constitution.

It is claimed on behalf of Strang that his constitutional rights were violated by denying him the right to counsel in the grand jury room during his interrogation; that government counsel failed to advise him of his right to counsel before testifying and to have counsel present outside the grand jury room for purposes of consultation; and that he was subpoenaed and questioned without giving notice to

his counsel. It is argued that because of these violations the indictment should be dismissed as to Strang either because of the alleged constitutional violations or by reason of the Court's supervisory power over federal law enforcement. The question was raised by a motion before trial to dismiss the indictment. The motion was denied.

The appellant, Edward P. Strang, Jr., was president of Wayne National Life Insurance Company. It was the arrangement between Wayne and Franklin, which we will hereinafter discuss, that gave rise to the conspiracy and other charges herein involved. Strang while under investigation of the charges for which he was later indicted was called to testify before the grand jury concerning the case about which he was being investigated.

It appears from the record before us that Strang had a conversation with Mr. Barton W. Morris, assistant United States Attorney, before entering the grand jury room and was advised that anything he said could be used against him and that he did not have to testify to anything that might incriminate him. The same admonition was given to him in the grand jury room after he was sworn. In his conversation with Mr. Morris, Strang asked if he could have his lawyer with him in the grand jury room and was told that he could not. Before entering the grand jury room Strang knew what the investigation was about and of the possible involvement of himself and Wayne. For sometime prior to his appearance before the grand jury he had consulted with five lawyers and there is evidence that he knew for two days that a subpoena had been issued for him to testify before the grand jury. Before entering the grand jury room Strang requested and received permission to make a telephone call.

It has been recognized that a potential defendant may be subpoenaed to testify before a grand jury. *United States* v. *Clearly*, 265 F.2d 459 (C.A. 2), cert. den. 360 U.S. 936; *United States* v. *Winter*, 348 F.2d 204 (C.A. 2), cert. den.

382 U.S. 955. See also, *United States* v. *Luxenberg,* 374 F.2d 241 (C.A. 6). Rule 6(d) F.R.Crim.P. provides:

> "Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

It has never been held except in *Sheridan* v. *Garrison,* 273 F.Supp. 673 (E.D.La), that a witness, whether a potential defendant or not, has a constitutional right to have a lawyer present with him in the grand jury room. The grand jury is an ancient institution and the only agency of our jurisprudence that is secretive. Its proceedings are not adversary. Its function is only investigative. It does not determine guilt or innocence. It determines only whether there is sufficient evidence to cause an accused to stand trial before a petit jury. There is no right of an accused to cross-examine witnesses or to introduce evidence in rebuttal. The grand jury has in all ages stood between the accused and his unjust accusers. One accused of crime may oftentimes, by himself testifying before the grand jury, clear up the charges against him so that no indictment is returned. Strang told Mr. Morris that he would testify voluntarily and may well have had the hope that he could explain his part in the Wayne-Franklin affair.

Admittedly *Escobedo, Miranda* and *Wade*[2] are not factually analogous to Strang's position in the case at bar. We are unwilling to extend the principle of those cases to the right of a potential defendant to have a lawyer present with him in the grand jury room. There are other means of

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[2] *Escobedo* v. *Ill.,* 378 U.S. 478; *Miranda* v. *Arizona,* 384 U.S. 436; *United States* v. *Wade,* 388 U.S. 218.

protecting a defendant from abuse of power of a prosecutor or from a violation of constitutional rights.

There was no obligation on the part of the government counsel to notify Strang's counsel that Strang was subpoenaed before the grand jury. Strang himself had ample opportunity to do that. He was never denied the right to have his lawyer accompany him to the door of the grand jury room and to have him wait outside while he was testifying. He was given permission to use the telephone before going into the grand jury room and he was free to have called his lawyer then if he wished to consult with him.

Prior to trial, appellant Strang filed a motion under Rule 6(e)[3] of the F.R.Crim.P. to inspect the minutes of the Grand Jury. In support thereof Strang stated:

> "On December 27, 1965, defendant filed a Motion to Dismiss, in which he alleged violation of his constitutional rights, both with respect to the Grand Jury Proceedings which led to the founding of the Indictment and to the Indictment itself, and in which he alleged that the form and manner in which he was questioned before the Grand Jury prejudiced him in the eyes of the Grand Jury, thereby inducing the return of the indictment against him. Such Motion to Dismiss is hereby incorporated in this Motion."

The motion to dismiss alleged that Strang's constitutional rights "not to be a witness against himself" and to "have

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[3] "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

the assistance of counsel for his defense were violated. The statement in his motion for inspection of the grand jury minutes concerning the manner in which he was questioned before the grand jury is taken almost verbatim from the motion to dismiss. The government submitted the transcript of Strang's appearance before the grand jury to the trial judge for an *in camera* inspection. The judge denied the motion. On appeal Strang only assigns as error the refusal of the trial judge to permit inspection of his own testimony before the grand jury.

The government concedes that under present Rule 16(a)(3),[4] effective July 1, 1966, the defendant would have been entitled to make such an inspection. However, the trial of this case was begun prior to the effective date of amended Rule 16, and is governed by the then prevailing law. Only upon a showing of a "particularized need" by a defendant, may a trial court intrude upon the secrecy of the grand jury proceedings and permit inspection of its minutes. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, rehearing den. 361 U.S. 855; *Dennis* v. *United States,* 384 U.S. 855. The rule requiring a demonstration of a "particularized need," prior to July 1966, applied equally to testimony of the defendant himself as well as other witnesses. It is within the trial judge's discretion to grant or deny a request for inspection of grand jury minutes and a denial of such a request is reversible only if the trial judge abused his discretion.

Nothing in the grand jury minutes would shed any light on Strang's contention that he was denied his constitutional right to counsel before the grand jury. It is undisputed that he did not have one in the grand jury room with him when he was testifying. His request concerning

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[4] "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any rlevant . . . (3) recorded testimony of the defendant before a grand jury."

counsel made to the prosecutor and the prosecutor's response thereto were not part of the grand jury proceedings and would not be contained in the minutes. It is also undisputed that the prosecutor advised Strang, outside of the grand jury room, of his right not to incriminate himself. The trial judge quoted the applicable portion of the grand jury minutes wherein Strang was advised of his right not to incriminate himself in his memorandum opinion overruling Strang's motion to quash the indictment. No additional information concerning the alleged violation of his right not to be a witness against himself could be gleaned from inspecting the minutes.

Other than the mere conclusory statement in both the motion to dismiss the indictment and the motion to inspect the grand jury minutes that the form and manner in which Strang was questioned before the grand jury was prejudicial, there is nothing to support such an assertion.

Under these circumstances we think that no "particularized need" was demonstrated which would permit the trial judge to allow an inspection of the testimony of Strang before the grand jury. The resolution of the issue was within the discretion of the trial judge and we hold that his discretion was not abused.

We consider next the question of the sufficiency of the evidence raised by appellants Strang and Howard. Because of the complicated and involved nature of the transactions with which we are concerned, it is necessary to present the following somewhat detailed statement of facts.

Franklin is a Michigan Corporation, located in Detroit, whose business is the processing, closing and servicing of real estate mortgages, principally those insured by the FHA or guaranteed by the VA. Levinson is its president and major stockholder. Howard, who began working for Franklin in September, 1962, had the title of Executive Assistant. Cerwin, one of the principal government wit-

nesses, became vice-president of Franklin in February, 1962. Franklin, as a "non-supervised" lender, was only able to secure VA guaranties on the prior approval basis. In 1962, and prior thereto, Franklin was having difficulty in getting guaranties on some of the loan applications it submitted to the VA because the veterans were poor credit risks. In early 1962,Cerwin met with Paul Kelly, head of the loan guaranty division of the Detroit VA office, in Kelly's office. Kelly told Cerwin that some of Franklin's loans were poor risks and requested Franklin not to burden the VA with such unnecessary work.

In 1962 Franklin became aware of the process of obtaining VA guaranties on an "automatic basis." Thereafter it entered into accommodation arrangements with "supervised" lenders who could automatically secure VA guaranties. Under these arrangements Franklin would process loan applications and submit them to the supervised lender who would make an independent check of the application to see if it conformed with the applicable statutes and regulations, and to determine if the veteran was a satisfactory credit risk. Upon approval of the loan, the loan would be closed by the "supervised" lender who would apply for an "automatic" guaranty from the VA. After receiving the guaranty, the supervised lender would assign the mortgage back to Franklin. Such accommodation arrangements, wherein, the "supervised" lender made an independent check of the veteran's credit and qualifications, were not illegal prior to June, 1963.

The "supervised" lenders were rejecting some of the loans submitted to them by Franklin and indicated to Franklin that they would not renew their arrangements and commitments after the expiration of their terms. In August, 1962, Kelly wrote a long letter to Levinson dealing with Franklin's deficiencies in connection with submissions to the VA of 48 cases submitted through a supervised lender. Because Franklin needed new "automatic" sources

through which to process VA loans, Levinson directed Howard to seek out supervised lenders who would be interested in entering into such accommodation arrangements.

In early December, 1962, Howard contacted Edward P. Strang, President of Wayne National Life Insurance Company, a small company with its office in Detroit, Michigan. Harold Bayer was General Counsel of Wayne, an officer, and a member of the Board of Directors and the finance committee. Kenneth Koppin was Executive Vice President of Wayne and managed the everyday affairs of the company. After Howard explained to Strang that Wayne could process VA mortgages on an automatic guaranty basis, Howard arranged a meeting between Strang and Levinson.

In mid-December, 1962, Strang met with Levinson, Howard and Cerwin at Franklin's offices. The nature of the VA loan guaranty program was explained to Strang and discussed. A subsequent meeting was held several days later. It was agreed at these meetings that Franklin would originate and process approximately $200,000 worth of loans to be made by Wayne who would submit them to the VA for automatic guaranties. After receiving the guaranty, Wayne would assign the loans to Franklin. Wayne would receive a 1% fee on the closing and a 1% fee on the assignment of the loan to Franklin. A contract dated December 20, 1962, and signed by Strang on behalf of Wayne, and Levinson on behalf of Franklin, outlined several portions of the agreement between the parties. The government has not contended and does not contend that this written agreement violates the law.

Cerwin testified that it was agreed between Wayne and Franklin that Wayne's sole task was to supply the money and obtain the VA guaranty in its name, and that Franklin would attend to all the details, including the credit check. Strang's statement which he made to the FBI is to the

same effect. Levinson disagreed with this characterization of the arrangement and testified that it was his understanding that Wayne would perform the credit analyses as did the other supervised lenders with whom Franklin had accommodation arrangements.

On December 21, 1962, Strang, in agreement with Koppin, discussed the desirability and legality of the contract with Bayer. Strang informed Bayer of the nature of the agreement and the VA loan guaranty program. According to Strang, he submitted the matter to Bayer for his review and approval. However, Strang neglected to inform either Koppin or Bayer that he had already signed the agreement with Franklin on the preceding day. Furthermore, he did not inform them that he had also signed a letter dated December 21, 1962, to Levinson authorizing Franklin to close 22 loans at 91% of par.

In order to submit loans to the VA through Wayne, Levinson contacted Mitchell of Rem Realty and told him to bring down some business as Franklin had a new source who could secure guranties on the automatic basis. Rem Realty Company was a Michigan corporation whose main business was to buy old houses in the run-down inner city area and try to sell them to veterans in hopes of obtaining a VA loan guaranty. Mitchell and Medinis were the principal stockholders of Rem, but because of their prior involvement with bankrupt operations, had others pose as the officers and directors of Rem. Rem falsified the credit reports of veterans in the hope that the applications would then be accepted for a VA guaranty. Cerwin who was present when Levinson telephoned Mitchell, testified that Levinson told Mitchell that the new source for VA guaranties "would take anything" regardless of the credit of the veterans, including "derogs." "Derogs" is a term used in the mortgage business to refer to derogatory or poor credit risks. Mitchell told Medinis to take all VA cases, regardless of anything, over to Levinson. Medinis and Mitchell brought

approximately 12 to 15 cases to Franklin's office, which they characterized to Cerwin and Dorothy Stuart, Cerwin's secretary, as bad risks and "garbage," another term in the mortgage business meaning poor credit risks. Cerwin told Levinson that the Rem loans were poor credit risks and that Franklin was looking for trouble if they submitted them to the VA. Levinson ordered Cerwin to process them anyway. Levinson denied everything except telling Mitchell to bring in some cases as they had a new source.

Approximately 22 loans, 15 of which were from Rem, were "closed" between December 26th and December 31, 1962. The loans were closed at the offices of Burton Abstract Company. Inasmuch as Wayne had not yet authorized the disbursement of funds to cover the loans, the closing papers were signed by the respective parties and held in escrow by Burton. The "closings" were most unusual in that they were completed before the loans were processed and before they were submitted to a "supervised" lender for an independent credit check and approval. The papers for the "closing" were all prepared at the offices of Franklin. In connection with the submission of the loans to the VA, false information concerning the credit of the veterans was prepared and the signatures of numerous veteran borrowers and Strang were forged. Dorothy Stuart, Cerwin's secretary testified that both Cerwin and Howard directed her to sign the names of Strang and the veteran borrowers to various documents that were thereafter submitted to the VA. She was further told by both Cerwin and Howard that Strang had authorized the signing of his name. Howard and Cerwin denied this.

A partial disbursement of Wayne funds was made by check dated January 4, 1963, and negotiated on January 7th, both prior to any formal approval of the loans by Bayer. Contrary to Strang's intimations, this initial disbursement was prior to any authorization by Bayer. Koppin signed the check at his home where it had been brought by Nancy

Murray, a Wayne secretary, and Howard. Koppin testified that he signed the checks on the assurances of Strang that it was a transaction separate from the Franklin arrangement and involved "good" mortgages. He further stated that had he known the check was in connection with the Franklin arrangement he would not have signed it because Bayer had not yet given his approval. This disbursement was made out of additional funds Wayne had available for investment.

On January 8, 1963, after the loans had been closed in escrow and after an initial disbursement had been made thereon, Cerwin and another Franklin employee, brought the files of the cases to Bayer's office. Cerwin testified that Strang, who arrived shortly after he did, made the statement that they were going to go through the motions of approving the loans. At this meeting and one held the following day, Bayer would not authorize the disbursement of Wayne funds unless Franklin executed an unconditional agreement to buy back any mortgage that the VA refused to guarantee. Cerwin said such an agreement was satisfactory but that Levinson had to sign it. Thereupon Bayer authorized the disbursement of funds to cover the first group of closed loans. Levinson at first signed the agreement, but thereafter excised his signature. When Bayer learned of this, he wrote Strang and advised him that he was not in favor of this arrangement with Franklin unless they had such an agreement and questioned whether Franklin was the "type of company we wish to do business with." Howard later signed a buy-back agreement telling Bayer that he was not an officer of Franklin and that he had no authority to sign the agreement. Bayer then authorized the disbursement of the balance of the funds, and never formally revoked his authorization.

Some time in January, 1963, Levinson suggested to Strang that an extra point be paid upon the closing of the loan. Levinson testified that Mitchell told him that Rem was

very anxious to close the deals and would be willing to pay an extra point to expedite the matter. Strang agreed and told Levinson to pay part of the extra-point moneys to him personally and part to the First Fidelity Corporation, a family-owned corporation of which Strang was a major stockholder.

Late in January and early February 1963, the first loan packages were sent to the VA for its guaranties. Franklin made the actual submissions but accompanied them with a covering letter on Wayne stationery. Strang had sent Wayne stationery over to Franklin's office, and told Dorothy Stuart to contact his secretary when she needed more. In early February 1963, the VA approved Wayne as a "supervised lender" under its guaranty program. At this point the VA was not aware of Franklin's interest in the loans. An examination of the loan packages by the VA indicated that most were poor credit risks and the proper standards had not been followed. Seven of the 22 applications submitted by Wayne were rejected by the VA.[5] Kelly, loan guaranty officer at the Detroit office of the VA, asked another employee to arrange for Strang to come to their office and discuss the loan program. Strang declined to go but sent his personal secretary, Arnold Tunesi. Howard accompanied him. Strang told Howard not to reveal that Howard was associated with Franklin. Howard introduced himself at the VA as "Mr. Ross." A VA official lectured Tunesi and Howard about the bad credit risks being submitted by Wayne. This meeting was followed by a letter to Strang, three weeks later, explaining in detail the objec-

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[5] The VA's rejection of seven of Wayne's applications for guaranties was based on the following statement from the Veterans Administration Lenders Handbook, Section 1032:

> "In the absence of fraud or material misrepresentations, the VA will not substitute its judgment for the lender's as to the credit risk assumed in any particular case nor question the validity of a guaranty already issued."

tions of the VA and warning that if Wayne's performance did not improve, it would be placed on a "prior approval" basis.[6]

On March 1, 1963, Strang resigned as President of Wayne, but remained on its Board of Directors and its Finance Committee.

It is apparently conceded by all that conviction on the substantive counts of the indictment is contingent upon a finding that the appellants were members of a conspiracy and that the acts which are the subject of the substantive charges were committed in furtherance of the conspiracy. It is conceded that there are false and fraudulent statements contained in the documents submitted to VA.

Strang contends that the agreement between Wayne and Franklin was not illegal and therefore he could not be guilty as charged. The government concedes that accommodation arrangements between "supervised" and "non-supervised" lenders were not inherently illegal at the time of the transactions involved herein.[7] The government does not contend that the written agreement dated December 20, 1962, between Franklin and Wayne violates the law. Rather it is the government's position that Levinson, Franklin,

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[6] "If after a reasonable period the lender fails to demonstrate satisfactory performance, consideration will be given to the possibility of requiring prior approval for all future loans." Veterans Administration Lenders Handbook, Section 1032.

[7] In a general information letter date June 1, 1963, the VA stated:

> "The V.A. has re-examined its position and has determined, as a matter of administrative policy, that the interest of the Government and of lenders and veterans will be best served by requiring supervised lenders to discontinue the closing of loans on the automatic basis in those instances where such closing would be for the accommodation of a non-supervised lender, i.e., closing under the automatic procedure will have the effect of enabling the non-supervised lender to do indirectly what it may not do directly."

Howard, Strang and the other conspirators went beyond the bounds of legal action and conspired to defraud the United States of the lawful operation of its VA home loan guaranty program by submitting to the VA for automatic guaranty, through Wayne, a 'supervised" lender, loans which the parties knew did not meet the requirements of Section 1801 et seq. and the rules and regulations promulgated thereunder.

Appellants Strang and Howard contend that there is insufficient evidence to support the jury's verdicts of guilty.[8] An appellate court's function in reviewing the verdict of a jury is very limited. We do not sit as a trier of fact and will not enter into a de novo consideration of the evidence. The verdict of the jury cannot be reversed if there is substantial evidence to support the findings of guilt. *Glasser* v. *United States,* 315 U.S. 60; *United States* v. *Knight,* 36 U.S. 505. In considering the sufficiency of the evidence, we do not determine whether it establishes guilt beyond a reasonable doubt, but only that the evidence would permit the triers of facts to find the defendants guilty beyond a reasonable doubt. *Ramsey* v. *United States,* 248 F.2d 740 (C.A. 6); *United States* v. *Ragland,* 306 F.2d 732 (C.A. 4) cert. den. 371 U.S. 949. In considering the sufficiency of the evidence in a criminal case, we must construe the evidence most favorably to the government. *Glasser* v. *United States, supra.* This includes the drawing of all reasonable inferences and reasonable credibility determinations favorable to the government. *Glasser* v. *United States, supra; United States* v. *Decker,* 304 F.2d 702 (C.A. 6). To do otherwise would usurp the prerogatives of the jury.

The following quotation from the Court's opinion in *United States* v. *Luxenberg, supra,* at pp. 249-250, concerning knowledge of and participation in a criminal conspiracy

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[8] Levinson does not argue the sufficiency of the evidence.

is relevant to the questions raised by appellants herein on the sufficiency of the evidence:

> "Knowledge, like intent is a factual issue which may be proved by circumstantial evidence. Whether a conspiracy exists is likewise a factual question . . . It is not fatal to the prosecution's case that it does not prove that the defendants knew or participated in every phase of the unlawful scheme. (Citations omitted.) It is only necessary that a defendant know of the conspiracy, associate himself with it, and knowingly contribute his efforts in its furtherance. (Citations omitted.) Participation in a conspiracy need not be proved by direct evidence. '(A) common purpose and plan may be inferred from a 'development and collocation of circumstances.' (Citations omitted.) It is not necessary that there be a formal agreement in order to have an unlawful conspiracy. (Citations omitted.) 'Almost always, the crime is a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose.'" (Citations omitted.)

Applying those principles to the evidence that was before the jury, we conclude that there was sufficient evidence to support the jury's vedicts of guilty against Howard and Strang. Howard was the one who introduced Levinson to Strang, and made the initial contact with Wayne. He was present at the initial meeting between Levinson and Strang. According to Dorothy Stuart's testimony, Howard directed her to sign the names of the veterans applying for loans and of Strang. Howard accompanied Nancy Murray to Koppin's house where Koppin signed a check dated January 4, 1963, under misleading representations. Howard eventually signed the buy-back agreement requested by Bayer. Further, Howard accompanied Tunesi to the VA offices where he introduced himself as "Mr. Ross" to avoid making known his relation to Franklin. There is further

evidence that Howard visited at least one veteran who had not yet occupied the home involved and threatened him with criminal prosecution if he did not move in.[9] He also arranged for certain mortgages to be kept current by bringing checks to the veterans for their endorsement, which checks were then recorded by Franklin as mortgage payments.[10] This evidence, together with all the other evidence presented to the jury, is sufficient to support the guilty verdict entered against Howard.

If the evidence relative to Strang merely supported a finding of imprudent business practices or acumen, the jury would not have been warranted in returning a verdict of guilty against him. However, this was not the case. Stang signed the agreement with Franklin on December 20, 1962, and thereafter attempted to secure the approval of Wayne's general counsel without informing him that he had already executed it. A letter dated December 21, 1963, and signed by Strang, gave Franklin permission to close 22 loans at a time when no one at either Franklin or Wayne had made a proper credit check. Furthermore, 22 loans were closed before the end of the year, prior to securing Bayer's approval of the arrangement. Cerwin testified that Strang said that he was going through the motions of approving the loans. Strang personally signed some of the reports sent to the VA which stated that the loans met the requirements of the statute and regulations, when in fact they did not and when Strang hardly examined the files. Strang arranged for the partial disbursement of funds by check, dated January 4, 1963, by misleading Koppin as to the purpose for which the funds were required. Strang supplied Franklin with Wayne stationery and told Dorothy Stuart to contact his secretary

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[9] The VA regulations require that a veteran occupy the home on which a guaranty is sought.

[10] By keeping the payments up to date, appellants were trying to prevent the government from contending that the loans were bad.

when she needed more. Strang told Howard to conceal his connection with Franklin when Howard accompanied Tunesi to the VA's offices. Strang personally, and a corporation of which Strang was a major stockholder, profited on the extra point Rem Realty had agreed to pay. This evidence taken in conjunction with the other evidence before the jury is sufficient to support its finding of Strang's guilt.

Appellants Levinson, Franklin and Strang contend that the trial judge committed reversible error in permitting the government, over objection, to elicit testimonial evidence concerning transactions involving the FHA. The evidence concerned the false and fraudulent obtaining of FHA mortgage insurance on two loans previously rejected by the VA which were the subject of counts 26 to 33 of the indictment. These counts were severed from the trial in the instant case. However other aspects of these two loans involving veterans Reese and Spates, were the subject of several substantive counts of the indictment which were submitted to the jury.

Strang contends that the evidence was inadmissible because it concerned matters and dealings with which he had no connection and because the acts were committed subsequent to the termination of the conspiracy with which he was allegedly connected. Strang relies on the well settled principle of law that the declarations of a co-conspirator made after the termination of the conspiracy and not in furtherance thereof are admissible only against the declarant and not against the other alleged conspirators. See, *Krulewitch* v. *United States,* 336 U.S. 440. While *Krulewitch* may apply to declarations of conspirators, the case does not govern evidence of acts of co-conspirators committed subsequent to the termination of the alleged conspiracy which are admissible if relevant to prove the conspiracy and which demonstrate its existence and illegal purposes. *Lutwak* v. *United States,* 344 U.S. 604, rehearing den. 345

U.S. 919. Cerwin's testimony was relevant to prove the aims of the conspirators and the manner in which similar frauds were perpetrated and as such were admissible against all appellants.

Appellants Levinson and Franklin argue that the admission of such testimony was contrary to the trial judge's original order severing counts 26 through 33 from the trial herein and was extremely prejudicial to their positions. The mere granting of a severance does not thereafter preclude a trial judge from admitting evidence relating to crimes which are the subject of the severed counts of an indictment if such evidence satisfies the applicable rules of relevancy to the issues of the case on trial. As indicated above such evidence was clearly admissible.

We hold that the trial judge did not abuse his discretion and thereby commit error in permitting Cerwin to testify concerning the securing of FHA mortgage insurance on the Reese and Spates loans.

During the course of the trial, over the objection of Franklin's and Levinson's counsel, F.B.I. Agent Bolton testified to the substance of an oral statement made to him by their co-defendant Strang and the government introduced into evidence the unsigned copy of the statement itself. Prior to Bolton's testimony and the receipt of the statement into evidence, the judge cautioned the jury that both the written and oral statements were admissible against Strang only and could not be considered against any of the other co-defendants. Appellants Franklin and Levinson contend that the trial judge comitted reversible error in not sustaining their objections to such evidence. Strang's statements were not confessions of guilt. Levinson and Franklin characterize them as exculpatory as to Strang and extremely inculpatory as to themselves. Levinson and Franklin object to those portions of Strang's statements which indicate that Levinson and Franklin agreed to assume full responsibility for examining and approving mortgages as

far as credit was concerned, on behalf of Wayne and that Levinson, Howard and Cerwin had forged his signature on letters and documents submitted to the Veterans Administration.

In support of their position, appellants Franklin and Levinson, rely primarily on the recent Supreme Court decision in *Bruton* v. *United States,* 391 U.S. 123. *Bruton,* in overruling *Delli Paoli* v. *United States,* 352 U.S. 232, held that a defendant's right to cross-examine may be violated by the introduction into evidence, in a joint trial, of a co-defendant's incriminating extra-judicial statements. In the circumstances, of that case, the Supreme Court held that cautionary instructions by the judge to the jury could not eliminate the substantial prejudice to the petitioner. In *Roberts* v. *Russell,* 392 U.S. 293, the Supreme Court held that the *Bruton* rule was retroactive. But *Bruton* clearly recognized that "(n)ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instruction to disregard such information." *Bruton* v. *United States, supra.* Cautionary instructions are important to overcome those situations in which this is great risk that the jury will not or cannot abide by the judge's instructions to the detriment of the defendant's vital interests. The Supreme Court characterized the statement of *Bruton's* co-defendant as *"powerfully incriminating."*

Strang, like *Bruton's* co-defendant did not take the stand. Contrary to Franklin's and Levinson's assertions it cannot be said that the allegedly inculpatory portions of Strang's oral and written statements had a devastating effect on the minds of the jurors. Franklin and Levinson argue that Strang's extra-judicial statements regarding Levinson's and Franklin's alleged assumption of complete responsibility for checking credit "was unequivocally the most dam-

aging information reaching the jury box concerning the appellants Levinson and Franklin Mortgage." However the case may be, the record is replete with other evidence and testimony to the same effect. Cerwin testified that at a meeting attended by Levinson, Strang and himself, Levinson agreed on behalf of Franklin to assume the responsibility in regards to making an analysis of the credit. The testimony of Dorothy Stuart, a secretary and clerk at Franklin, further indicates that Franklin closed loans without first submitting the papers to Wayne for processing. Medinis testified that when Levinson called him he told him that all Medinis' applications for mortgages would be approved "regardless of anything." Cerwin corroborated this testimony and further testified that after both he and Medinis commented on the poor quality of the applications, Levinson ordered Cerwin "to go ahead and process them anyway." Other evidence and testimony further supports the view that Franklin and Levinson knew that a good number of applications were from extremely poor credit risks and that Wayne would not and could not make a credit check, but relied upon the office of Franklin to perfom the check.

Levinson argues that Strang's statements to the effect that he "did not authorize Levinson, Howard, Cerwin or anyone else to sign my signature" implied that Levinson was guilty of such wrongdoing. In view of the other evidence presented at the trial, little weight must be given to this argument. Dorothy Stuart testified that she signed Strang's name to various documents at the insistance of Cerwin and Howard. Furthermore, because of the fact that Strang's signature was required on various documents sent directly by Franklin to the Veterans Administration, it must be assumed that someone at Franklin had directed the signing of Strang's name on the documents.

In view of the fact that Strang's statements added little, if anything, to a record replete with similar and corroborative evidence, it cannot be said that the cautionary instructions accompanying the admission into evidence of Strang's oral

and written statements was insufficient to eliminate any possible prejudice to Franklin and Levinson. Furthermore, we conclude that the admission of such statements, even if it be considered error, was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18, rehearing den. 386 U.S. 987.

Contrary to appellants Levinson's and Franklin's contentions we hold that it was proper for the trial judge to permit testimony concerning the practices of prudent lenders in the Michigan area. Such testimony was relevant because it provided the background information concerning the transactions with the VA, explained the procedures used in the Detroit VA office and established the effect or materiality of the allegedly false statements contained in the documents submitted to the VA.

Strang contends that the trial judge committed error in failing to instruct the jury as he requested with respect to the conspiracy count. The government presented its case on the basis of a single conspiracy which had as its purpose the defrauding of the United States and the violation of Section 1001, Title 18, U.S.C. Strang's theory was that there was not one over-all conspiracy, but that there were actually two separate and distinct conspiracies, one, to avoid the statutory and regulatory requirement that the supervised lender exercise its independent judgment as to the qualifications of the loan, and the other to submit false statements concerning the loan applications to the VA. Strang contended that even if he was a member of the first conspiracy, he was not and could not be connected with the second. In accordance with this position, Strang requested the trial judge to charge the jury that if Strang was a member of only one prong of the conspiracy and not a member of the over-all conspiracy, Strang should be acquitted on Count one of the indictment. The trial judge agreed with the government's contention that this was a single conspiracy aimed at thwarting the lawful operation of the VA home

loan guaranty program. The government submitted the case on this basis, the court instructed the jury on this basis, and there was more than sufficient evidence to support the jury's implicit finding of a single conspiracy. The trial judge believed that no evidence was presented which warranted an instruction of a multiple conspiracy charge as requested by Strang. He stated:

> "I think I indicated I saw no evidence of any secondary agreement. There is one conspiracy here or there isn't any. At least that is my conclusion from the testimony."

We have carefully reviewed the entire record in this case and hold that the trial judge was correct in denying Strang's request for a multiple conspiracy charge.

We find no merit to Strang's claim that the trial judge did not properly instruct the jury on the defense of advise of counsel. It is questionable that he was entitled to any instruction on that defense. Admittedly Strang did not fully advise his counsel as to all of the circumstances of the transaction and he signed the agreement on December 20th before he consulted his lawyer. It was not the contract itself which was illegal but the conduct under it, of which counsel was not fully advised, that constituted the conspiracy. On December 21 1962, prior to obtaining any approval of Wayne's General Counsel, Strang signed a letter authorizing Franklin to close 22 loans.

Appellants Strang, Levinson and Franklin contend that reversible error resulted from the trial judge's refusal, in his charge, to read, explain and interpret pertinent regulations of the VA concerning the home loan guaranty program. The pertinent regulations were read to the jury numerous times during the course of the trial. Defense counsel referred to them extensively during opening statements and closing arguments. Kelly of the VA was on the

witness stand for nine days during which time he was examined and was examined extensively on the meaning of the regulations. The "Lenders Manual," published by the VA, was introduced into evidence and was available to the jury during its deliberations. The trial judge referred to and quoted several parts of the VA's regulations and manual in his charge to the jury. The meaning and substance of the regulations were adequately before the jury and the trial judge did not err in denying Strang's, Levinson's and Franklin's requested instructions concerning the interpretation and meaning of the regulations. No claim is made, and none can be made, that the trial judge improperly instructed the jury on the elements necessary to find appellants guilty of conspiracy and the various substantive offenses charged.

Judgment affirmed.

APPENDIX B

Pertinent Portion of V.A. Letter Dated June 19, 1963

Instances have been reported to the Veterans Administration Central Office where supervised lenders have closed loans on the automatic guaranty basis for non-supervised lenders as an accommodation to the non-supervised lender. Upon closing of the loan the mortgage is transferred to the non-supervised lender or to a third party designee of the non-supervised lender. *In another type of accommodation arrangement, supervised lenders in some areas have permitted a non-supervised lender to function as its "authorized agent" and to execute the automatic guaranty loan reports and other documents for and on behalf of the supervised lender, the closed loan being assigned to the non-supervised lender or to its designee.* These procedures circumvent the prior approval requirement applicable to loans to be originated by a non-supervised lender (Emphasis added).

Previously the Veterans Administration informed several supervised lenders that specific automatic loan closing procedures submitted for Central Office consideration were not legally precluded by the governing law or by the Loan Guaranty Regulations, although the procedures contemplated assignment of the loan to non-supervised lenders or to their designees.

The V.A. has re-examined its position and has determined, as a matter of administrative policy, that the interests of the Government and of lenders and veterans will be best served by requiring supervised lenders to discontinue the closing of loans on the automatic basis in those instances where such closing would be for the accommodation of a non-supervised lender, i.e., closing under the automatic procedure will have the effect of enabling the non-supervised lender to do indirectly what it may not do directly.

Accordingly, supervised lenders presently participating in such an accommodation arrangement should terminate the procedure within 30 days.

APPENDIX C

Petitioner's Requested Charge on the Subject of a Variance

Now if you find that there are separate conspiracies relating to the undertaking and acts alleged in the Indictment in Count 1 and that not all of the defendants were members of or participated in such separate conspiracies, then you may only consider as evidence against the members of such conspiracy the acts and declaration of a co-conspirator involved in that particular conspiracy.

This means that if you find one conspiracy and agreement dealt only with the accommodation arrangement, that is that Franklin Mortgage Corporation would process loans on behalf of Wayne National Life Insurance Company, and that a separate conspiracy and agreement existed to submit false documents to the Veterans Administration, you may consider as evidence against a defendant in only one conspiracy only those acts and declarations of the co-conspirators involved in that same conspiracy.

APPENDIX D

Statutes Involved

18 U.S.C. § 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

38 U.S.C. § 1802:

> ". . . . . (d) Loans will be automatically guaranteed under this chapter only if made (1) by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State, or (2) by any State. Any loan proposed to be made to a veteran pursuant to this chapter by any lender not of a class specified in the preceding sentence may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this chapter."

38 U.S.C. § 1810:

(a) Any loan to a veteran, if made pursuant to the provisions of this chapter, is automatically guaranteed if such loan is for one or more of the following purposes:

> (1) To purchase or construct a dwelling to be owned and occupied by him as a home.

(2) To purchase a farm on which there is a farm residence to be owned and occupied by him as his home.

(3) To construct on land owned by him a farm residence to be occupied by him as his home.

(4) To repair, alter, or improve a farm residence or other dwelling owned by him and occupied by him as his home.

If there is an indebtedness which is secured by a lien against land owned by the veteran, the proceeds of a loan guaranteed under this section or made under section 1811 of this title for construction of a dwelling or farm residence on such land may be used also to liquidate such lien, but only if the reasonable value of the land is equal to or greater than the amount of the lien.

(b) No loan may be guaranteed under this section or made under section 1811 of this title unless—

(1) the proceeds of such loan will be used to pay for the property purchased, constructed, or improved;

(2) the contemplated terms of payment required in any mortgage to be given in part payment if the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income expenses;

(3) the veteran is a satisfactory credit risk;

(4) the nature and condition of the property is such as to be suitable for dwelling purposes;

(5) the price paid or to be paid by the veteran for such property, or for the cost of construction, repairs, or alterations, does not exceed the reasonable value thereof as determined by the Administrator; and

(6) if the loan is for repair, alteration, or improvement of property, such repair, alteration, or improvement substantially protects or improves the basic livability or utility of such property.

(c) The amount of guaranty entitlement available to a veteran under this section shall not be more than $7,500 less such entitlement as may have been used previously under this section and other sections of this chapter.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1206

EDWARD P. STRANG, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1968. A petition for rehearing *en banc* was denied on February 5, 1969. On February 26, 1969, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and includ-

ing March 27, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his right to counsel in connection with his appearance before the grand jury.

2. Whether the trial judge properly refused to charge the jury that it could find that the evidence established the existence of two conspiracies.

3. Whether the trial judge erred in refusing to explain and interpret in his charge all the various regulations of the Veterans Administration concerning the home loan guaranty program.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and others [1] were convicted of violating 18 U.S.C. 371 by conspiring to violate 18 U.S.C. 1001 and to defraud the Veterans Administration by preventing it from having its loan guaranty program administered in accordance with the provisions of 38 U.S.C. 1801 *et seq.*, and of related substantive offenses. The substantive counts variously charged petitioner and his codefendants with specific violations of 18 U.S.C. 1001 by submitting false and fraudulent statements

[1] Codefendants Howard, Levinson and Franklin Mortgage Company have also filed certiorari petitions which are now pending (Nos. 995 and 1089, this Term).

to the Veterans Administration. Petitioner was convicted on each count in which he was charged. (See 8a-17a, 18a-47a, 1843a).[2] He was fined $10,000 and sentenced to imprisonment for eighteen months under the parole eligibility provisions of 18 U.S.C. 4208(a) (214a). The court of appeals affirmed (Pet. App. A).

1. The evidence is set forth in detail in the opinion of the court of appeals (See Pet. App. A 14-21, 24-25). Here we outline the scheme proved at trial, with particular emphasis on petitioner's participation since he claims that the evidence supports the conclusion that there were two conspiracies.[3]

The Veterans Administration's home loan program is based upon 38 U.S.C. 1801 *et seq.* which provides for the issuance by the VA of guaranties on mortgage loans made to veterans. Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Automatic guaranties are made on loans by "supervised lenders"—*i.e.*, any financial institution, insurance or mortgage and loan company that is subject to "examination or supervision" by an agency of the federal or a state government. Where automatic guaranties are involved, the supervised lender is responsible for determining whether the loan meets the requirements of the statute and regulations. "Non-supervised lenders"—*i.e.*, those not subject to

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[2] Record references are to the Joint Appendix filed in the court of appeals which is on file with the Clerk of this Court.

[3] We have also summarized the evidence in our response to the petitions of Howard, Levinson and Franklin Mortgage Corporation (See the government's brief in opposition in Nos. 995 and 1089, this Term, pp. 3-8).

the supervision of a federal or state agency—must seek guaranties on the "prior approval basis." In the latter situation, the VA, not the lender, makes the final determination as to whether or not the loan comports with all statutory and regulatory requirements. If the loan is held to qualify, the VA so notifies the lender who then closes the loan and submits the loan to the VA which issues its guaranty (337a).

Franklin Mortgage Corporation was a non-supervised lender and Benjamin Levinson was its president and major stockholder (341a); Ross Howard was Levinson's executive assistant (578a). In December, 1962, Howard contacted petitioner Strang, president of Wayne National Life Insurance Company, a supervised lender, and explained to him that Wayne could process VA mortgages on an automatic guaranty basis (1292a). Subsequently co-defendant Levinson and Strang entered into a written contract dated December 20, 1962, under which Franklin Mortgage Corporation would originate and process approximately $200,000 worth of loans to be made by Wayne. Wayne would then submit the loans to the VA for automatic guaranties and, after receiving the guaranties, would assign the loans to Franklin (G. Ex. 45, 1947a-1949a). Robert Cerwin, a vice president of Franklin, and an unindicted co-conspirator, testified that it was also agreed between Wayne and Franklin that Wayne would obtain the VA guaranties, but Franklin would attend to all the details, including the credit checks on the loans (581a-583a, see also 942a,

945a).[4] Although Strang sought approval for his agreement with Levinson from other officers of Wayne, he did so only after he had entered into the agreement, and without telling them he had done so (Pet. App. A 17).

Levinson thereafter contacted Rem Realty, a small real estate corporation dealing mostly with inner city properties and poor credit risks (1059a-1062a). He told its owners that he had a new source (Wayne) which could secure VA guaranties on an automatic basis (870a-873a), and would accept anything regardless of the credit risks involved. Rem Realty thereafter brought to Franklin's office approximately 12 to 15 applications which were characterized by its sales manager as "garbage"—*i.e.*, poor credit risks (869a-875a, 589a-591a). Robert Cerwin examined some of these files, and noted that some of the loans had been previously rejected. He warned Levinson that Franklin was looking for trouble if these loan applications were submitted to the VA for automatic approval. Levinson, however, ordered that the applications be processed (595a-597a).

The papers in connection with the submission of 22 loans (including these 15 from Rem) were prepared at Franklin. These papers contained false information concerning the credit of the veterans. In a number of instances the signature of the veteran borrower was forged (826a-827a, 1059a-1061a). The applica-

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[4] Strang's pre-trial statement to the FBI agreed that such was the understanding (see 1188a-1204a, 1233a-1246a). Defendant Levinson testified, however, that as he understood the agreement, Wayne alone was to check credit (1486a).

tions were not submitted to Wayne for an independent credit check. A secretary at Franklin signed Strang's name to various forms (826a-828a) but some were signed by Strang himself (825a-826a; G. Exs. 6B and D, 1914a, 1915a, 1917a). After the loans were already closed, Strang went "through the motions of approving these cases" for Wayne (600a). Even before such approval, however, there had been a partial disbursement of Wayne funds—a "very unusual" practice in the mortgage industry (985a-986a). An executive officer of Wayne, Kenneth Koppin, had cosigned the checks for partial disbursement, because Strang had assured him that they related to "good mortgages" which would make a "good investment". (933a). From his conversation with Strang, Koppin had assumed that the partial disbursement related to a different transaction (972a-973a).

In late January and early February 1963, the loan packages were sent to the VA for its guaranties. Although Franklin actually made the submissions, the covering letter was on Wayne stationary which had previously been provided by Strang (346a, 1014a, 1913a).

The VA had no knowledge of Franklin's involvement at this time (411a-412a, 402a-403a). An examination of the loan package by the VA indicated that most were poor credit risks and that proper standards had not been followed (see 358a-359a, 376a-379a). Seven of the 22 applications were rejected by the VA (Pet. App. A 20). The VA then invited Strang to call at its office to discuss the loan program (394a-398a). Instead, Strang sent his secretary and

co-defendant Howard. Strang told Howard to conceal the fact that he was an employee of Franklin. At this meeting, Howard posed as a "Mr. Ross," a representative of Wayne (1030a-1032a, 1047a).

2. Prior to trial, petitioner moved to dismiss the indictment alleging, *inter alia*, that he was required to testify before the grand jury which ultimately returned the indictment in this case in violation of his Fifth and Sixth Amendment rights (59a). Following a two day evidentiary hearing on this issue,[5] the district court denied the motion with a lengthy memorandum opinion (105a-123a).

The evidence at the hearing showed that on July 31, 1964, almost three months before petitioner was called before the grand jury, he and James Draper, one of his lawyers, conferred with an FBI agent concerning the agent's interview with petitioner some two weeks before. The meeting of July 31 was arranged by petitioner so that his lawyer could review the statements Strang had made at the earlier interview.[6] The agent advised counsel and Strang that he was investigating mortgage transactions processed through Franklin, and that Strang might or might not ultimately be charged as a defendant. Mr. Draper indicated an awareness that petitioner could be

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[5] Prior to the hearings, opposing affidavits had been filed (See 66a-74a, 75a-76a, 79a-80a, 83a-85a, 86a, 87a-88a).

[6] Before conversing with the agent on this earlier date (July 13, 1964) petitioner was advised of his right to silence and counsel. The statement he made was an attempt to exonerate himself of any responsibility (See 1188a-1204a; see also 1233a-1246a).

charged as a member of a conspiracy (107a-112a, 116a-117a).

On October 20, 1964, a marshal attempted to serve a grand jury subpoena calling for petitioner's appearance on October 22. While actual service could not be accomplished (112a), the district court found that, as of October 20, petitioner was aware that his appearance was desired two days later. The court also found that all during this period petitioner had the services of at least five attorneys, and that he had the opportunity to contact and consult with counsel regarding his appearance before the grand jury (118a-120a). Petitioner appeared on October 22, and, before going into the grand jury room, conferred with the Assistant United States Attorney handling the investigation. He was advised that he did not have to testify to anything that might incriminate him. When he asked if he could take his attorney into the grand jury room, he was told that he could not. He was, however, permitted to make a telephone call before he entered the grand jury room. After being sworn before the grand jury and before questioning began, petitioner was again advised that he did not have to give any testimony that might incriminate him and that any testimony he gave would be "free and voluntary." He acknowledge the warning and thereupon testified (118a-119a, 120a).

Based on its resolution of the facts, the district court found no Fifth Amendment violation in the circumstances surrounding petitioner's appearance before the grand jury since he was aware of his status "as a potential defendant and of his right not to in-

criminate himself" (120a-121a). The court further found that "Strang had the assistance of counsel prior to entering the grand jury room and had the opportunity to avail himself of the assistance of counsel before entering the grand jury room as a witness" and voluntarily chose not to avail himself of that right (121a).

ARGUMENT

1. Petitioner argues that he was denied his right to have counsel present while the grand jury was interrogating him.[7] The refusal to grant petitioner's request that counsel be permitted to appear before the grand jury with him was, however, in accord with long-established policy presently embodied in Rule 6(d) F. R. Crim. P. The validity of this policy rests upon the proposition that for the grand jury to serve its unique investigatory function, it must operate with unfettered inquisitorial power. Its purpose is not to determine questions of guilt or innocence, nor are its operations comparable to the custodial inter-

[7] Petitioner also raises the issue (Pet. 11) that as a potential defendant he should not have been called as a witness before the grand jury at all. But petitioner was not a *de facto* defendant. On the contrary, at the time he was called, the grand jury was still seeking information in support of its investigation. In such circumstances, petitioner was properly subject to inquiry. See *e.g.*, *United States* v. *Scully*, 225 F. 2d 113, 114 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *Fortunato* v. *United States* (C.A. 2), No. 1273 Misc., this Term, certiorari denied, March 24, 1969; *Capaldo* v. *United States* (C.A. 2), No. 1352 Misc., this Term, certiorari denied, April 21, 1969.

rogation of an accused by government agents. Compare *Miranda* v. *Arizona*, 384 U.S. 436; see also, *United States* v. *Wade*, 388 U.S. 218. The function of the grand jury is to determine whether formal criminal charges should be lodged and against whom, a function which would be severely impaired by transforming it into an adversary proceeding. *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; see also, *In Re Groban*, 352 U.S. 330, 333.[8]

Nor, on this record, is there substance to the contention that "fundamental fairness" (Pet. 13) required government counsel specifically to advise petitioner that he had a right to confer with counsel outside the grand jury room. As the district court expressly found, beginning nearly three months before his grand jury appearance, petitioner had the services of at least five lawyers in connection with the pending investigation. Furthermore, petitioner knew two days before the return date of the subpoena that he was required to appear before the grand jury (120a). And, at his meeting with the government prosecutor on the day he was to appear, petitioner was permitted to use the office telephone. In this context, it is un-

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[8] The contrary district court decision in *Sheridan* v. *Garrison*, 273 F. Supp. 673 (E.D. La.) may fairly be limited to its peculiar facts. There, in the face of a substantial allegation that the witness was called before the grand jury for the purpose of harrassment, the district court was of the view that he should not, before the grand jury, "be forced outside the presence of counsel to match legal wits with the District Attorney" (273 F. Supp. at 684). There is not the slightest suggestion in this case that the grand jury function was misused to harass petitioner.

realistic to say that petitioner was deprived of his rights because he was not specifically informed that he had a right to confer with an attorney. As the court of appeals rightly held, petitioner was never denied these rights; he simply chose to forego them. (See Pet. App. A 12).

Nor, in these circumstances, were petitioner's rights violated because the government prosecutor failed to advise counsel for petitioner that petitioner had been subpoenaed to testify. Government counsel had every reason to expect that petitioner, an experienced business man, who had sought and obtained the assistance of counsel at an earlier stage in the case and who had ample opportunity to contact counsel before his appearance before the grand jury, would contact his lawyer or lawyers if he deemed such a procedure necessary.[9] In any event, compliance with Canon 9 of the Canons of Professional Ethics is not "a requirement of constitutional dimensions." *United States* v. *Smith*, 379 F. 2d 628, 633 (C.A. 7), certiorari denied, 389 U.S. 993. See *Massiah* v. *United States*, 377 U.S. 201, 210-211 (dissenting opinion).

2. Petitioner contends that the evidence showed two distinct conspiracies—the accommodation agreement in which he was involved, but which was lawful,

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[9] The situation here is thus far removed from the failure to notify counsel which troubled the dissenters in *Jones* v. *United States*, 342 F. 2d 863, 871, 878-884 (C.A.D.C.). There the defendant was an indigent who, after he had been arrested on a charge of assault and robbery, was taken before the grand jury and questioned about a previous confession without his appointed counsel being notified.

and the submission of false statements to the VA in which he was not involved at all—and that, in this factual setting, the trial court erred in refusing to instruct the jury on a multiple conspiracy theory. The evidence, however, showed a unitary scheme to thwart the VA in the operation of its home guaranty loan program. The government's case was not that the December 1962 agreement itself was illegal—a position which the government has never taken (see Pet. App. A 16)—but that it marked the commencement of a single scheme to defraud, participated in by all defendants. The evidence showed that Strang was involved in this scheme. He provided blank Wayne stationary which Franklin used for cover letters to accompany the fraudulent Rem loan packages to the VA; he himself signed several certifications on false VA documents (G. Exs. 6B, 6D, 1914a, 1915a, 1917a); he stated that he was simply going "through the motions" of approving the loans prepared at Franklin; he authorized partial disbursement before the loans were officially approved; and he affirmatively sought to conceal Franklin's involvement from the VA. He was, in short, an active partner in one overall scheme. As the district court concluded "[t]here is one conspiracy here or there isn't anything" (1649a). The court's instructions properly reflected this assessment of the evidence and the jury's verdict establishes that petitioner was found to be a knowing member of that conspiracy.

3. Petitioner (as the petitioners in Nos. 998 and 1089) urges that the trial court committed reversible error in refusing in his instructions to explain and

interpret the regulations of the VA concerning the home loan guaranty program. As the court of appeals noted, however, the pertinent regulations were read to the jury numerous times during the trial, and defense counsel referred to them extensively during closing arguments (G.A. 7-13).[10] An official of the VA was on the stand for nine days and was examined in great detail on the meaning of the regulations (433a-437a, 466a-467a, 476a, 480a, 485a, 493a, 496a, 503a-507a, G.A. 2-3). The "Lenders Manual" published by the VA was introduced into evidence and was available to the jury during its deliberations. The trial judge referred to the regulations in his charge and carefully instructed the jury as to all the elements necessary to prove violation of 18 U.S.C. 371 and 1001 (1761a-1766a).[11] Since the essence of the government's case was not that the accommodation arrangements was per se illegal, but rather that it was used to facilitate a scheme to defraud the VA, a detailed instruction concerning the regulations was not required.

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[10] "G.A." designates the government's appendix to its brief in the court of appeals which is presently on file with the Clerk.

[11] *United States* v. *Guterma*, 281 F. 2d 742, 750-752 (C.A. 2) is inapposite. In that case, the court failed to define a technical regulatory term ("net book value"), the meaning of which was essential for determining whether the accused had the duty to file a report, where the failure to file such a report was the basis of a charge lodged against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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